APPENDIX A

NEVADA DEPARTMENT OF ADMINISTRATION
BEFORE THE APPEALS OFFICER

FILED
DEC 13 2000
Dept. of Administration
Appeals Officer

In the Matter of the Industrial Insurance Claim	Claim Number: 92-032695.2 7143990211
Of	Hearing Number: CHE1999-C-2468-EC CHS1999-C-2167-EC
COLIN PERRY	Appeal Number: CAE1999-E-907-TR CAE1999-C-898-TR CAE1999-E-842-TR

Appeals by the Claimant, Employer and Employer's self-insured group from the decisions of the Hearing Officer dated March 25 and April 13, 1999.

DECISION OF THE APPEALS OFFICER

The above-entitled matter was heard on September 25, 27 and November 7, 2000. The final transcript was received on November 29, 2000. The Claimant was represented by Barbara Gruenewald, Esq. The Employer Insurance Company of

Nevada, a mutual insurer, was represented by Susan Campbell, Esq. The Employer and the Public Agency Compensation Trust (PACT) were represented by Robert Balkenbush, Esq. The hearing was conducted pursuant to Chapters 233B and 616A to 616D of the Nevada Revised Statutes.

Issues:

1. Must a police officer prove his employment caused his heart disease to receive coverage?

2. Is the conclusive presumption provided by statute for coverage of heart disease for police officers unconstitutional?

3. Should the 1992 claim for heart disease be reopened or a new claim accepted?

4. Since the same employer employed the police officer, but the insurers covering the employer changed, does the last injurious exposure rule apply?

Having heard the testimony and considered the documents, the Appeals Officer finds as follows:

FINDINGS OF FACT

The Proceedings

1. Mr. Perry has been in law enforcement since 1976. He was a deputy sheriff for Elko County from July 1986 to February 2000. In 1992 he suffered an injury to his heart and the Insurer for the County at that time, the State Industrial Insurance System (SIIS), now Employers Insurance Company of Nevada, a mutual insurance company (EICN), accepted his claim. In 1998, he suffered a new injury to his heart and filed a claim with his Employer, Elko County. The Public Agency Compensation Trust (PACT) which is the self-insured group presently insuring the County, denied his claim.

2. In Appeal Number CAE1999-E-842-TR, the Hearing Officer reversed PACT's determination and applied the conclusive presumption regarding heart disease and last injurious exposure rule to require PACT to cover the 1998 injury. The Employer and PACT appealed.

3. In Appeal Number CAE1999-C-989-TR and Appeal Number CAE1999-E-907-TR, the Insurer (EICN), denied the Claimant's request to reopen his 1992 claim. The Hearing Officer affirmed the decision under the last injurious exposure rule. The Claimant, the Employer and PACT appealed that decision.

4. At all times in this case, PACT represented the Employer.

The Claimant's Work History

5. The Claimant began his career as a special deputy for the City of Wells and Elko in 1976. In July 1986, he became a deputy sheriff for Elko County. The Claimant had no break in his employment. Exhibit 28.

6. Since 1986, the Claimant was the deputy assigned to Mountain City, Nevada in northeast Elko County. He was the sole deputy responsible for an area of 8,000 square miles surrounding Mountain City. Exhibit 29. He lived in the police substation and was "on-call" for work 24 hours a day, seven days a week. His "official" shift for duty was weekdays from 2 to 10 P.M. and weekends from 6 P.M. to 2 A.M. This shift allowed him to be on duty when the local bars were busy. His supervisor and relief personnel were in Elko 85 miles away. The Claimant was relieved for vacations or hunting trips by a deputy from Elko. If the Claimant transported prisoners to jail in Elko, it required 6 hours for the round trip.

7. According to the Claimant, his assignment "wasn't a job, it was a life."

8. His duties as sheriff were varied. They included removing abandoned vehicles, monitoring the local bars, making traffic stops and completing reports on vandalism or other activities. Exhibits 18 to 24. In July 1995, he was shot at during a DUI traffic stop and called for back-up help from Elko. The Elko deputies arrived over an hour later while he was still in pursuit and under gunfire. The assaulting driver, known to the Claimant for many years as a local resident, was killed during this shoot-out.

9. Since the "shoot-out" was a significantly stressful event, Dr. Seaich reported it in his notes in October 1995. Exhibit 11, page 46.

10. The Claimant served as the local resident deputy coroner. His duties included attending the death scenes of friends and other residents of the County. He completed the tasks necessary to transport the body and the reports regarding the cause of death, whether from terminal illness or suicide.

11. In poignant testimony, Officer Clair Morris, the Claimant's supervisor, confirmed his duties and shift hours, including the on-call status of the job. Officer Morris is stationed in Elko, 85 miles away. He described the occasions when he would assign other officers to relieve the Claimant for vacations or assist him on special tasks, such as recovering dead bodies. He also described the lonely outpost manned by the Claimant. He replaced the Claimant with two officers who share the duties in Mountain City, since Officer Morris was unable to find one officer with the Claimant's dedication and willingness to work all hours of the day and night. Officer Morris holds the Claimant in high esteem and believes the Claimant served and protected his County well.

12. Counsel for PACT emphasized the variety of tasks performed by the Claimant as a police officer which were not stressful or did not require long hours on the job, such as recovering abandoned vehicles. The summaries of the

Claimant's duties and his "on-call" status contradict Counsel's view of the job actually performed by the Claimant over his many years with the County. I accept the descriptions of the deputy job independently offered by Officer Morris and the Claimant.

13. The Claimant was employed full-time and continuously as a deputy sheriff for more than 5 years in Nevada.

The Medical Evidence

14. The Claimant suffered from unstable angina from an occlusion in his right artery on June 26, 1992. The Insurer for the County at that time was EICN, formerly SIIS. The Insurer accepted his claim for coverage. In July 1993, the Claimant received a 15 percent permanent partial disability (PPD) award. Exhibit 1, page 96 and Exhibit 7, pages 49 to 52. He was released and returned to his full time work as a deputy with no restrictions. His employer, Elko County, knew about his condition and retained him as a deputy.

15. On September 5, 1998, the Claimant suffered chest pains and immediately sought medical treatment. Dr. Owens diagnosed unstable angina and performed an angioplasty on the left artery. Exhibit 8. The Claimant returned to work, but in late September 1998, suffered leg and back injuries from lifting a dead body at the scene of an automobile accident. That claim is not at issue in this case. Exhibits 5 and 6.

16. In 1999, the Claimant underwent another angioplasty. Exhibit 8, pages 22 to 24 and Exhibit 15.

17. Upon receipt of the medical records for the 1998 treatment, the Insurer denied the Claimant's request to reopen the 1992 claim. The Employer, through PACT, denied the claim for the 199[illegible]ent since he had heart disease in 1992.

18. Drs. Owens, Chanderraj and Bryg agree coronary artery disease is heart disease. Exhibits 15 and 26 and Transcript of September 27, 2000. Coronary artery disease causes ruptures and lesions in the arteries. The physicians agree the Claimant has coronary artery disease and suffers from heart disease. They agree he suffered lesions and ruptures requiring angioplasty in 1992, 1998, and 1999. They agree that the event in 1998 is a new rupture but his coronary artery disease progressed since the original 1992 event.

19. While the Claimant's coronary artery disease progressed from 1992 to 1998, the rupture in 1998 was a new event in a different artery requiring treatment at that time. As Dr. Bryg, for PACT, notes "each time he had an episode of acute coronary syndrome, otherwise known as unstable angina." Exhibit 26, page 12 from pages 47 and 48 of his Deposition. He further states: "Mr. Perry has coronary artery disease, and he had underlying coronary disease that continued from 1992 on. What caused the specific incident in 1998 is not what happened in 1992, but he had a separate lesion rupture 1998, but it is from the arteriosclerosis that he has had ongoing all along. If he did not have arteriosclerosis, he would not have had his acute coronary event." Exhibit 26, page 15 from page 58 of his Deposition.

20. The physicians disagree whether stress caused the coronary artery disease or the ruptures in 1992 and 1998. Dr. Chanderraj, for the Claimant, opines that continued stress on the job increases the risk of, and causes heart disease in police officers and firefighters. Dr. Bryg, for PACT, disagrees and believes only stress from specific emotional or physical events causing immediate angina and pain could be job-incurred. The Nevada Legislature accepted Dr. Chanderraj's position and adopted a conclusive presumption regarding heart disease.

21. The Claimant suffers conditions predisposing him to heart disease. These include his age, diabetes,

hyperlipidema, hypercholesterolemia (high cholesterol), high blood pressure and obesity. He's had diabetes since 1988 and controls it with insulin, diet and exercise. His weight has remained stable or been reduced over 6 years. He takes medications for his blood pressure and cholesterol. The Claimant explained his diet, medications and his actions to correct and treat his medical conditions.

22. Neither Drs. Owens nor Seaich, his treating physicians, gave written directions to the Claimant to correct any of his predisposing conditions. He was compliant with the instructions and medications given by his physicians. Drs. Chanderraj and Bryg could not find any record of non-compliance by the Claimant.

23. The Claimant complied with all the requirements for physicals requested by his Employer. Exhibit 11 and Transcript of September 27, 2000.

24. The Claimant must show he met all the requirements for coverage for heart disease. He sustained that burden and was a credible witness. The Claimant protected and served Elko County for 14 years. Now the statute protects him from his heart disease.

25. The Claimant's Employer throughout those 14 years was Elko County. The County retained him as an employee when he was released to work after the 1992 event. During this period, the carrier for workers compensation changed from the state fund, SIIS, and its successor EICN, to the self-insured group, PACT.

26. The Employer argues that even if the conclusive presumption regarding heart disease applies for acceptance of the claim, the presumption does not apply to the application of the last injurious exposure rule.

The Reopening Request

27. The claims adjuster, for the Insurer, Jennifer Pozun, explained her decision to deny the reopening of the 1992 claim after the 1998 rupture. Because the Claimant was released to full duty, received his PPD and the new rupture was in a different area of the heart, she determined the claim could not be reopened. A new occurrence required a new claim. She did note that a new claim allows the payment of greater compensation, such as wages, since a reopened claim is subject to the wages payable at the time of the original claim. NRS 616C.425. No physician certified a change of circumstances from the 1992 rupture.

CONCLUSIONS OF LAW

Based on the previous Findings of Fact, I conclude, as a matter of law, that:

Requirements for Coverage

1. To be covered for heart disease, a police officer must:

(a) Have a "disease of the heart;"

(b) Have been employed in a full-time continuous, uninterrupted and salaried occupation as a police officer;

(c) Have been employed "in this state;"

(d) Be so employed before the date of disablement;

(e) Submit to pre-employment and annual physical examinations; and

(f) Correct any predisposing conditions leading to heart disease "when so ordered in writing by the examining physician subsequent to the annual examination" if the

correction is within the employee's ability. Subsections 1,3,5 and 6 of NRS 617.457.

2. The Claimant was a deputy sheriff for the County from 1986 to February 2000. He was employed full time, and was on-call for 24 hours a day, 7 days a week. He had no interruption in employment in Elko County, Nevada. He suffered from coronary artery disease, which is heart disease. He was still employed when disabled by the disease. He submitted to each physical examination required by the Employer. He observed and complied with all the dietary advice of his physicians and the medications they prescribed, to minimize and correct his predisposing medical conditions to the best of his ability.

3. If the statutory conditions are met, "diseases of the heart...are conclusively presumed to have arisen out of and in the course of employment." Subsection 1 of NRS 617.457. When the conclusive presumption applies the conditions of the job are of no moment. "Conclusive" means "not admitting of explanation or contradiction; put an end to inquiry;...beyond question." "A conclusive presumption, called also an 'absolute' or 'irrebuttable' presumption, is a rule of law determining the quantity of evidence requisite for the support of a particular averment which is not permitted to be overcome by any proof that the fact is otherwise." Black's Law Dictionary.

4. The Nevada Supreme Court considered the application of the heart statute to retired firefighters. After reviewing the legislative history of the statute, the Court noted the expanded occupational disease coverage for police officers and firefighters. The Legislature relieved "them from the burden of proving a causal connection between their employment and their disease. (T)he legislature has accepted the existence of such a causal connection and has incorporated it in NRS 617.457(1)." Gallagher v. City of Las Vegas, 114 Nev. 595 at pages 600 to 601 (1998). Finding they "were

employed in full-time continuos, uninterrupted and salaried occupations as firefighters in this state for more than five years before they were disabled, their heart diseases are conclusively presumed to have arisen out of and in the course of their employment." Id. at page 601 and 602. The firefighters "are therefore entitled to occupational disease benefits as a matter of law. We need not decide whether substantial evidence supports the appeals officers' determinations that (they proved)...a casual connection between disease and employment." Id. at page 602.

5. The Claimant provided evidence regarding his duties, his hours of work and the stress of his job. The Employer denigrated this evidence, arguing that the removal of abandoned cars and reports regarding unsolved acts of vandalism were not stressful. While this evidence was presented, none of it was necessary. The conclusive presumption that heart disease is occupational applies if all of the other conditions for coverage are not met by the Claimant. Subsection 1 of NRS 617.457.

6. The Claimant systematically proved he met every requirement for coverage in NRS 617.457. He was employed as a police officer for more than 5 years in this state, participated in all the required physicals, cooperated and corrected his predisposing conditions within his ability and he suffers from heart disease. The conclusive presumption that his heart disease is occupational applies and he receives coverage as a matter of law. NRS 617.457 and Gallagher, supra.

Reopening of the 1992 Claim

7. An Insurer may reopen a claim for further examination and treatment if the physician certifies a change of circumstances related to the occupational disease warranting an increase or rearrangement of compensation. Subsection 8 of NRS 617.457. The Claimant suffered a progression of his coronary artery disease from 1992 to 1998. There is no

evidence of a change of circumstance justifying the reopening of the original claim. No doctor certified such a change. In fact, a new claim form was completed for the 1998 injury. The Insurer properly denied the request to reopen his 1992 claim.

8. If the claim has been reopened, the compensation payable would have been based upon the original claim in 1992 which may have been less than the 1998 compensation. NRS 616C.425.

Last Injurious Exposure Rule

9. If an employee suffers from an occupational disease, the courts allow him to receive coverage form the insurer of the last employer who contributes in any manner to his disability. Collett Electric v. Dubovik, 112 Nev. 193 (1996). If both injuries or diseases are occupational, the last injurious exposure rule is used to determine liability. Las Vegas Housing Authority v. Root, 116 Nev. Adv. Opn. No. 92 (August 30, 2000).

10. In the past, coverage for industrial injuries and occupational diseases was provided in Nevada only by the state fund, NIC and then SIIS. In the early 1980's, the Nevada Legislature began to change this monopoly, allowing first self-insured employers, then groups of employers and in 1999, private carriers to provide coverage. As of January 1, 2000, the state fund became a private carrier as a mutual insurer.

11. With the changes in insurers providing coverage, the application of the last injurious exposure rule in Nevada must be explained. The Court has referred in the past to the possibility the rule should be used to require coverage for the last insurer of the employer. "(T)he *employer/insurer* at the time of (a new injury or aggravation of a prior injury) is liable for all the claimant's benefits even if the second injury would have been much less severe in the absence of the prior

condition, and even if the prior injury contributed to the final condition." (Emphasis added) Collett Electric, supra at page 198. Applying the rule to employers *and insurers* is consistent with the last injurious exposure rule used to assign liability. See generally: 9 Larson's Workers' Compensation Law, Chapter 153 (2000).

12. In this case, it is the insurer that changed not the employer. The Employer, Elko County, has been the Claimant's Employer since 1986. The Claimant's Employer continued to employ him after his 1992 rupture until his 1998 rupture. He had the same duties and working environment continuously from 1992 through 1998. The Employer subjected him to the same employment risks contributing to the progression of his coronary artery disease and the rupture in 1998. The conclusive presumption for heart disease applies continuously to the Employer. Over the years, the only change was the Employer's insurer, from SIIS, now EICN, to the Self-Insured group, PACT. Nevertheless, the last injurious exposure rule applies to the change of *insurer*.

13. The rupture in the heart creating the 1998 claim occurred during the period that PACT insured the Employer. The claim was made during that same period. PACT is liable for the payment of the claim.

14. The conclusive presumption for coverage applies when the claim is submitted and accepted. The last injurious exposure rule is applied after the presumption is applied. The Employer argues the cause of the heart disease must be proven to apply the last injurious exposure rule. To return to a requirement that causation be shown for heart disease after applying the statutory presumption is illogical. The insurer covering the Employer during the 1998 rupture is liable for the claim.

15. Elko County and its Self-Insured Group, PACT must pay the compensation owed for the 1998 claim.

Constitutionality

16. The Employer challenged the constitutionality of the conclusive presumption for coverage of heart disease of police officers and firefighters provided in NRS 617.457. The challenges were made on the record to preserve its arguments.

17. The Appeals Officer is not a court for review of constitutional challenges. As the Supreme Court notes, "...an administrative officer such as the NIC Appeals Officer cannot validly exercise purely judicial functions under article 6, section 1, or article 3, section 1, of the Nevada Constitution,..." Nevada Industrial Commission v. Reese, 93 Nev. 115 at page 120 (1977). Recently, the Court found the Nevada statutes defining the courts of this state do not "define...any other administrative agency as a lower court." State Engineer v. Truckee-Carson Irrigation, 116 Nev. Adv. Op. No. 109 at page 5 (November 30, 2000). "(W)e conclude that administrative agencies,...are not 'lower courts' for the purposes" of the Court's own rules, even if they are acting as the exclusive trier of fact. Id.

18. The Appeals Officer cannot consider the constitutionality of a statute. Such a request must be addressed to the District Court. The courts are the arbitrators of the constitutionality of statutes. See also: Marbury v. Madison, 5 U.S. 137 (1803), analyzing the role of the federal, Article III courts.[6]

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[6] The Employer argued the coverage provided for heart disease is "special" legislation for one class of state employees, police officers, favoring them over all others. Such "special" legislation is prohibited by the Nevada Constitution. Article 4, Sections 20 and 21 of the Nevada Constitution. The Nevada Legislature considered the special nature of the duties of police and firefighters and extended coverage to them for specific diseases and illnesses, such as cancer, lung, heart and some infectious diseases. See: NRS 617.455, 617.457, 616A.035 and

DECISION

1. The Hearing Officer decision in Appeal Number CAE1999-E-842-TR reversing the denial of the claim by PACT for the 1998 rupture is reversed. The Employer and Self-Insured Group, PACT, are responsible for compensation.

2. The Hearing Officer decision in Appeal Number CAE1999-C-898-TR and CAE1999-E-907-TR affirming the denial of the request to reopen the 1992 case and applying the last injurious exposure rule for the 1998 claim is affirmed.

APPEALS OFFICER

s/ Teresa P. Froncek Rankin
TERESA P. FRONCEK RANKIN

NOTICE: Pursuant to NRS 233B.130, should any party desire to appeal this final decision of the Appeals Officer, a Petition for Judicial Review must be filed with the district court within thirty (30) days after service by mail of this decision.

616A.265. Those protections were granted because of special nature of their jobs and the exposure they have to such diseases, particularly during rescue or emergency situations. If the Legislature has a rational basis for the special coverage for those employees, the statutes are not special legislation. The Nevada Supreme Court discussed those choices when considering the coverage for retired officers in Gallagher, supra.

Nevada's attorney general must be notified of challenges to the constitutionality of any statute and may be heard in such an action. NRS 30.130.

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b) I certify that I am an employee of the State of Nevada, Department of Administration, Appeals Officer, and that on this date I deposited for mailing at Carson City, Nevada a true copy of the attached document addressed to:

COLIN PERRY
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And further provided a copy of the attached document by way of personal messenger from the agencies of:

EMPLOYERS INSURANCE COMPANY
OF NEVADA
LEGAL SERVICES
515 MUSSER ST.
CARSON CITY, NV 89714

December 13, 2000

s/ Kristi Fraser
Kristi Fraser

APPENDIX B

Code 2840

FILED
August 21 2002
Ronald A. Longtin, Jr., Clerk
By: s/ J. Ulleseit
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT FOR
THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

PUBLIC AGENCY COMPENSATION TRUST, a Self-Insured Association, Petitioner, vs. COLIN PERRY, and DOES I Through X, inclusive, Respondent.	Case No.	CV01-00160
	Dept. No.	3

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ORDER DENYING
PETITION FOR JUDICIAL REVIEW

On January 9, 2001, Petitioner Public Agency Compensation Trust (hereafter "PACT") filed a Petition for Judicial Review from the decision of the Appeals Officer of the Department of Administration Hearings Division regarding a worker's compensation claim. Respondents Colin Perry and

Employers Insurance Company of Nevada (hereinafter "EICN") each filed a Notice of Intent to Participate on January 25, 2001. The Record on Appeal was transmitted on February 13, 2001.

PACT filed its Opening Brief on May 29, 2001. EICN filed its Answering Brief on August 2, 2001. Perry filed his Answering Brief on August 2, 2001. PACT filed its Reply Briefs to EICN and Perry's answering briefs on October 4, 2001.

The Court heard oral arguments in this matter on January 23, 2002.

This Court, having read the above-referenced pleadings, reviewed the file and listened to oral arguments, now finds and concludes as follows:

The Appeals Officer has done an excellent job setting out the facts in this case, so the Court will summarize the main points. Perry has been in law enforcement since 1976. He was a deputy sheriff for Elko County from July 1986 to February 2000. Thus, Perry was employed full-time and continuously as a deputy sheriff for more than five years in Nevada. The Appeals Officer heard extensive testimony regarding his duties, responsibilities and working conditions as a deputy sheriff, as well as expert medical evidence concerning his coronary artery disease and his medical problems in 1992 and 1998.

In 1992, Perry suffered an injury involving an occlusion in the right artery of his heart, and the insurer for the County at that time, the State Insurance System (SIIS), now EICN, accepted his claim. In July 1993, Perry received a 15 percent permanent partial disability award. He returned to his full-time work as a deputy with no restrictions. Elko County knew about his condition and retained him as a deputy. In 1998, Perry suffered another injury involving the left artery of his heart. He filed a claim with his employer, Elko County, but PACT, the self-insured group presently insuring Elko County, denied his claim based on the fact that he had heart disease in 1992.

In Appeal Number CAE1999-E-842-TR, the Hearing Officer reversed PACT's determination and applied the conclusive presumption regarding heart disease and the last injurious exposure rule to require PACT to cover the 1998 injury. The Employer and PACT appealed. The Appeals Officer reversed this decision.

In Appeal Number CAE1999-D-989-TR and Appeal Number CAE1999-E-907-TR, EICN denied the Claimant's request to reopen his 1992 claim. The Hearing Officer affirmed the determination under the last injurious exposure rule. The Claimant, the Employer, and PACT appealed that decision. The Appeals Officer affirmed both of these decisions.

Based on the medical evidence before her, the Appeals Officer found that the 1998 injury was a new event in a different artery, although Perry had underlying coronary disease that continued from 1992 on. In considering the last injurious exposure rule, she determined that PACT was liable for covering the 1998 claim because it occurred during the period that PACT insured Elko County. The Appeals Officer also determined that EICN had properly denied Perry's request to reopen his 1992 claim because there was not evidence of a change of circumstance to justify reopening his claim.

The Appeals Officer found that the Nevada Legislature had adopted a conclusive presumption regarding heart disease in police officers and firefighters. She then found that Perry had complied with all his physicians' instructions and that he had complied with all the requirements for physicals requested by his employer. Thus, the Appeals Officer determined that Perry met all the requirements for coverage for heart disease and he was entitled to the conclusive presumption found in NRS 617.457.

In reviewing an administrative decision, the district court is limited to the record below and to the determination of whether the agency acted arbitrarily or capriciously. *McCracken*

v. Fancy, 98 Nev. 30, 639 P.2d 552 (1982). The district court shall not substitute its judgment for that of the agency as to the weight of the evidence on a question of fact. NRS 233B.140(3). The district court should not pass on the credibility of the witnesses or the weight of the evidence, but limit review to a determination that the board's decision is based on substantial evidence. *Nevada Indus. Comm'n v. Hildebrand*, 100 Nev. 121, 124, 676 P.2d 1318 (1984).

I. The conclusive presumption in NRS 617.457.

NRS 617.457 provides for a conclusive presumption that heart diseases have arisen out of and in the course of employment of any police officer or firefighter with five years or more of continuous, uninterrupted employment. PACT contends that since this conclusive presumption applies only to a select number of individuals out of the entire class of Nevada workers, it constitutes "special legislation" and violates the U.S. Constitution and Article 4, § 20 of the Nevada Constitution. PACT argues that this conclusive presumption also violates the Nevada Constitution because it operates to regulate county business since counties and other political subdivisions are generally the exclusive employers of the firefighters and police officers. Under this conclusive presumption, argues PACT, employers of police officers and firefighters with five years continuous employment must pay worker's compensation if the individual develops a heart condition, regardless of the actual cause of the condition.

Perry contends that NRS 617.457 is constitutional because it has a rational relationship to a legitimate government purpose. He argues that the legislative purpose behind the conclusive presumption was to resolve disputes among the medical community and avoid battles of experts regarding whether emotional stress and physical exertion contributed to

heart disease, so police officers and firefighters were relieved from proving a causal connection between heart disease and their employment. Perry also argues that other states have held such special "police-firefighter" type of statutes to be constitutional. Furthermore, Perry argues that he produced sufficient medical evidence at the hearing to establish the causal connection between heart disease and the stress associated with his job. Next, Perry argues that NRS 617.457 is not special legislation and it does not operate to regulate county business in a prohibited manner because it applies uniformly to all police officers and firefighters throughout the State of Nevada.

EICN argues that worker's compensation benefits are not listed as a prohibited item of special legislation in Article 4, § 20 of the Nevada Constitution. Further, EICN contends that the Nevada Industrial Insurance Act does not regulate county and township business; it merely defines the benefits that Nevada employees are entitled to when they are injured within the course and scope of their employment. EICN points out that NRS Chapter 617 also contains other special categories with specific occupational diseases. EICN then argues that even without the legislative presumption, police officers and firefighters are entitled to compensation for heart and lung disease if they meet the requirements of NRS 617.440 for occupational diseases. EICN contends that NRS 617.455 and NRS 617.457 relieve police officers and firefighters from the burden of proving a causal connection between their employment and heart disease. Finally, EICN argues that police officers and firefighters are not always entitled to receive benefits because they must submit to physical examinations and correct predisposing conditions which lead to heart disease when so ordered in writing to be eligible for benefits.

This Court finds that NRS 671.457 is not special legislation that violates Article 4, § 20 of the Nevada Constitution. As EICN noted, worker's compensation benefits

are not on the list of prohibited items of special legislation in Article 4, § 20, and other sections of NRS Chapter 617 permit the designation of categories for specific occupational diseases. The Court also finds that NRS 617.457 does not regulate county business in a prohibited manner because worker's compensation benefits are available to Nevada employees who are injured within the scope and course of their employment, and this statute applies to all police officers who are employed within Nevada for at least five years, regardless of which county they are employed with. Article 4, § 20 does not prohibit laws "relating to," "pertaining to," or "concerning" county business, and the Court finds PACT's argument that the statute regulates county business because counties employ police officers and firefighters to be without merit. *City of Reno v. County of Washoe*, 94 Nev. 327, 580 P.2d 460 (1978).

The Court is not persuaded by PACT's argument that all other jurisdictions with similar statutes have adopted rebuttable presumptions in favor of police officers and firefighters, not conclusive presumptions. The Court agrees with the Respondents that the Nevada Legislature specifically included the conclusive presumption in NRS 617.457 to limit litigation over whether heart disease among police officers and firefighters was work related because of the difficulty of resolving these cases due to the conflicting medical opinions on the subject. *See Gallagher v. City of Las Vegas*, 114 Nev. 595, 959 P.2d 519 (1998).

B. NRS 617.457 does not violate the Equal Protection Clause or the Due Process Clause of the 14th Amendment to the U.S. Constitution.

PACT argues that NRS 617.457 violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution because the classification for firefighters and

police officers bears no rational relationship to the legislative purpose behind it. PACT argues that the legislative purpose was to compensate employees for injuries or diseases which arise out and in the course of employment. Thus, PACT argues, a claimant must establish more than merely being at work and suffering an injury in order to recover. PACT contends that NRS 617.457 guarantees that Nevada firefighters and police officers will also be compensated for heart diseases which are not caused by employment because all they need to prove is that they were employed for five years or more as a firefighter or police officer before the date of disablement in order for heart disease to be conclusively presumed to have arisen out of and in the course of employment. As a result, PACT argues that it is being forced to hear the burden of funding heart conditions that were not caused by employment. Therefore, NRS 617.457 is not rationally related to the purpose behind the Nevada Industrial Insurance Act.

Perry contends that NRS 617.45 does not violate equal protection because the Nevada Legislature had a reasonable basis for the classification of police officers and firefighters under the statute and it is not arbitrary. Perry argues that PACT has failed to show that the classification does not rest on any reasonable basis. Further, Perry contends that all acts of the Nevada Legislature are presumed to be constitutional.

EICN argues that NRS 617.457 does not create a special class of individuals. Instead, it relieves police officers and firefighters from the burden of proving the causal connection between their heart disease and their employment, so long as they meet the requirements imposed by the statute. Next, EICN contends that there is a rational relationship to the legislative purpose because the Nevada Legislature determined that police officers and firefighters would receive protection under NRS 617.457 based on the nature of their jobs.

Next, PACT argues that NRS 617.457 violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution because there is not a rational relationship between the fact proved (5 years continuous employment as a police officer) and the fact presumed (any heart disease contracted by such an officer is causally related to his employment), so this determination is arbitrary and unreasonable and denies PACT the opportunity to rebut the presumption. PACT also contends that there is no substantial indication that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

Perry argues that the fact that the Nevada Legislature decided to resolve doubts regarding the causal connection between heart disease and employment in favor of police officers and firefighters does not render the statute arbitrary or irrational. Perry contends that such statutes are presumed to be valid and it is PACT's burden to prove that the statute is unconstitutional.

EICN argues that there is rational relationship to the legislative purpose of NRS 617.457, and PACT has failed to show that it has been deprived of any property or liberty interest by acceptance of a worker's compensation claim pursuant to the requirements of NRS 617.457.

Under NRS 617.358, workers seeking compensation for an occupational disease must establish by a preponderance of the evidence that the disease arose out of and in the course of employment. NRS 617.457(1) removes this burden for police officers and firefighters meeting certain criteria. *See Gallagher, supra.* This statute was enacted in 1969, and each amendment of the statute following its adoption thirty years ago has expanded, rather than limited, coverage. *See Gallagher.* Finally, acts of the Nevada Legislature are also presumed to be constitutional. *Sheriff v. Martin*, 99 Nev. 335, 662 P.2d 634 (1983).

Contrary to PACT's argument, police officers and firefighters are not always entitled to receive benefits. They must still submit to physical examinations and correct predisposing conditions which lead to heart disease to be eligible for benefits. Because of the highly stressful nature of the jobs that police officers and firefighters perform in protecting the public and the fact that these individuals often put their lives in jeopardy on a daily basis, along with the physical exertion required by these jobs, the Court finds there is a rational basis for establishng the conclusive presumption in their favor, and there is a rational relationship between the statute and the legislative purpose.

C. The Appeals Officer did not err in not determining whether Respondent's 1998 acute coronary syndrome was a recurrence of his coronary heart disease.

The Court concludes that the Appeals Officer did not err in finding that Perry's 1998 heart condition was a new and separate incident from the 1992 injury. Under *SIIS v. Swinney*, 103 Nev. 17, 731 P.2d 359 (1987), liability is placed on the insurance carrier who is covering the risk at the time of the most recent injury that bears a causal relationship to the disability because of the last injurious exposure rule. *Id.; see also SIIS v. Jesch*, 101 Nev. 690, 709 P.2d 172 (1985).

In the instance case, the Appeals Officer found that the Nevada Legislature had adopted a conclusive presumption regarding heart disease. The Appeals Officer heard testimony from Perry, his supervisor and Dr. Chanderraj. Perry and his supervisor testified that claimant was on call 24 hours a day, seven days a week and that he was responsible for an area of 8,000 square miles in Northeast Elko County, and had been involved in a shoot out. Dr. Chanderraj testified that the continued stress of police work leads to increased risk of heart

disease in police officers, and Perry produced medical literature to substantiate his claims. Based on the substantial evidence on the record, the Appeals Officer's applied the conclusive presumption in NRS 617.457(1) and found that Perry had met the requirements for coverage for heart disease.

The Appeals Officer then determined that although Perry had underlying heart disease, the 1992 and 1998 injuries were separate events because the blockage of Perry's right artery in 1992 was repaired and he returned to work for six years without any further symptoms before the injury in 1998, which involved a left artery. The Court finds that there was substantial medical evidence available to the Appeals Officer indicating that the stress from Perry's job as a police officer contributed in aggravating or exacerbating his existing heart condition and resulted in the heart problems that he had in 1998. The court concludes that the Appeals Officer was in the best position to weigh the evidence and observe the witnesses and determine their credibility.

D. The Appeals Officer did not exceed her jurisdiction in assessing expert witness fees against Appellant.

With regard to witness fees, NRS 616C.360(1) provides that:

> 1. Any physician or chiropractor who attends an employee within the provisions of chapters 161A to 616D, inclusive, or chapter 617 of NRS in a professional capacity, may be required to testify before an appeals officer. A physician or chiropractor who testifies is entitled to receive the same fees as witnesses in civil cases and, if the appeals officer so orders at his own discretion, a fee equal to that authorized for a consultation by the appropriate schedule of fees for

physicians or chiropractors. These fees must be paid by the insurer.

Under this provision, the Appeals Officer exercised her discretion in determining that the Relative Values for Physicians did not address fees to be paid to a testifying witness. The Appeals Officer determined that Plaintiff's expert was entitled to a fee comparative to what other physicians would charge for testifying as expert witnesses at trial, and she ordered PACT to pay $600.00 in witness fees. Based upon the language of NRS 616C.360(1), the Appeals Officer does not appear to be arbitrary or a clear abuse of discretion.

The Court does not consider PACT's appeal to have been frivolous, and therefore, denies Perry's request for attorney's fees on that basis.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

(1) Petitioner's Petition for Judicial Review is DENIED.

Dated this 20th day of August, 2002.

s/ Jerome Polaha
JEROME M. POLAHA
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 21st day of August, 2002, I deposited for mailing a copy of the foregoing to:

Robert F. Balkenbush, Esq.
Katherine F. Bobier, Esq.
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s/Jerrine Ulleseit
JERRINE ULLESEIT
Administrative Assistant

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF NEVADA

PUBLIC AGENCY COMPENSATION TRUST (PACT), Appellant, vs. COLIN PERRY AND EMPLOYERS INSURANCE COMPANY OF NEVADA, Respondents.	No. 40241 **FILED** **OCT 18 2005** **JANETTE M. BLOOM** **CLERK OF THE SUPREME COURT** **BY S/ J. Richards** **CHIEF DEPUTY CLERK**

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a workers' compensation case. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. Respondent Colin Perry was an Elko County deputy sheriff, who experienced chest pain in 1992 and 1998 and underwent at least one angioplasty after each episode. Respondent Employers Insurance Company of Nevada (EICON) accepted Perry's claim for coronary artery disease in 1992, but declined to reopen the 1992 claim in 1998. EICON asserted that this was a new injury or aggravation of the 1992 condition. Appellant Public Agency Compensation Trust (PACT), Elko County's workers' compensation provider in 1998, declined Perry's 1998 claim, determining that EICON should be responsible because the 1998 incident was merely a recurrence of his 1992 condition.

An appeals officer held PACT responsible for the 1998 injury, determining that it was a new event involving a different artery than in 1992. PACT now appeals from a district court denying its petition for judicial review.

Under the last injurious exposure rule, the insurer at the time of a new injury or an aggravation of a prior injury is liable for all the claimant's benefits;[1] for recurrences, however, the insurer at the time of the prior injury remains liable.[2]

An appeals officer's characterization of an injury is a fact-based conclusion of law entitled to deference[3] and will not be overturned if supported by substantial evidence.[4] Here, the appeals officer determined that the 1998 episode constituted a new event and, despite the conflicting evidence presented, substantial evidence supports such a determination. The 1998 injury occurred in the left anterior descending coronary artery as opposed to the right coronary artery, the site of Perry's 1992 stenosis. 1992 medical exams revealed that the left side of Perry's heart was operating normally at the time. Accordingly, we conclude that, under the last injurious exposure rule, the appeals officer did not err in determining that PACT was liable as the insurer at the time of the new injury. [5]

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[1] SIIS v. Swinney, 103 Nev. 17, 19-20, 731 P.2d 359, 361 (1987).

[2] Id. at 20, 731 P.2d at 361.

[3] Grover C. Dils Med. Ctr. v. Menditto, 121 Nev. ___, ___, 112 P.3d 1093, 1098 (2005) (citing Swinney, 103 Nev. at 20, 731 P.2d at 361).

[4] Id. at _____, 112 P.3d at 1097.

[5] We have considered PACT's arguments that the appeals officer erred in rejecting its offer of proof that the 1998 injury was a

PACT also argues that NRS 617.457 violates the due process clause. Every legislative enactment enjoys the presumption of constitutional validity, and appellants bear a heavy burden in overcoming it.[6] When considering the validity of legislation under due process attack, "the state enjoys a wide range of discretion to make reasonable classifications for enacting laws over matters within its jurisdiction."[7] "A statutory discrimination will not be set aside if any state of facts may be conceived to justify it."[8] The legislation could rationally conclude that firefighters and police officers run a higher risk of heart disease, thus serving as a reasonable basis for the legislation. We therefore conclude that NRS 617.457 does not violate the due process clause.

PACT also contends that NRS 617.457 violates the equal protection clause. When a classification does not involve a suspect class or fundamental right, or a quasi-suspect class such as gender, the rational basis test applies,[9] as it does here. Under the rational basis test, legislation meets the burden of

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recurrence, and improperly applied NRS 617.457, and conclude that they lack merit.

[6] Allen v. State, Pub. Emp. Ret. Bd., 100 Nev. 130, 133, 676 P.2d 792, 794 (1984).

[7] Id. at 134, 676 P.2d at 794.

[8] Id. at 135, 676 P.2d at 795 (quoting Koontz v. State, 90 Nev. 419, 421, 529 P.2d 211, 212 (1974)) (emphasis added in Allen); see also Boylan v. United States, 310 F.2d 493, 500 (1962) ("Where the legislative judgment as to reasonableness is drawn into question, the judicial inquiry is restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.").

[9] Allen, 100 Nev. at 135-36, 676 P.2d at 795-96.

review when it is rationally related to a legitimate government purpose.[10] "If any state of facts may reasonably be conceived to justify it, a statutory discrimination will not be set aside."[11]

Here, legislative history suggests that police officers and firefighters are at an increased risk of developing heart disease because of chronic stress on the job. As a result, the Legislature could have enacted NRS 617.457 for the purpose of encouraging firefighters and police officers to remain in public service or to eliminate costly "battles-of-the-experts" used to prove or disprove a causal connection between firefighting and police work and heart disease. Thus, we conclude that NRS 617.457 is reasonably related to achieving a legitimate government purpose, and that PACT has failed to overcome the statute's presumption of constitutional validity.

Finally, PACT argues that NRS 617.457 is special legislation regulating county business, which violates Article 4, Section 20, of the Nevada Constitution.[12] "[A] special law...is one which affects only individuals and not a class-one which imposes special burdens, or confers peculiar privileges upon one or more persons in no wise distinguished from others of the

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[10] Id. at 136, 676 P.2d at 795-96; Tarango v. SIIS, 117 Nev. 444, 454-55, 25 P.3d 175, 182 (2001).

[11] State v. District Court, 101 Nev. 658, 662, 708 P.2d 1022, 1025 (1985); see also, Boulder City v. Cinnamon Hills Assocs., 110 Nev. 238, 249, 871 P.2d 320, 327 (1994) ("It is well-settled under rational basis scrutiny that the reviewing court may hypothesize the legislative purpose behind legislative action.").

[12] Article 4, Section 20 of the Nevada Constitution states: "The legislature shall not pass local or special laws...[r]egulating county and township business..."

same category."[13] Laws regulating county business must be general and operate uniformly throughout the state.[14] NRS 617.457 is not a special law because it affects fulltime firefighters and police officers with at least five years of experience as a class, not individually, and it is a law of general application because it applies to such firefighters and police officers throughout the state. It does not limit its application to any one particular locality. Thus, we conclude that PACT's final argument lacks merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

s/ Becker, C.J.
Becker

s/ Douglas, J.
Douglas

s/ Parraguierre, J.
Parraguirre

cc: Hon. Jerome Polaha, District Judge
Thorndal, Armstrong, Delk, Balkenbush & Eisinger / Reno
Anderson & Gruenewald
Beckett & Yott, Ltd./Carson City
Badger & Baker
David R. Ford
William L. Keane

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[13] State of Nevada v. Cal. M. Co., 15 Nev. 234, 249 (1880) (finding that a law which categorizes delinquent taxpayers whose delinquency exceeds $300.00 is general and not constitutional).

[14] Nev. Const. art. 4.§ 21.

Michael E. Langton
John Oceguera, Assemblyman
Woodley & McGillivary
Washoe District Court Clerk

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEVADA

PUBLIC AGENCY COMPENSATION TRUST (PACT) Appellant, vs. COLIN PERRY AND EMPLOYERS INSURANCE COMPANY OF NEVADA, Respondents.	No. 40241 **FILED** **DEC 20 2005** **JANETTE M. BLOOM** **CLERK OF THE SUPREME COURT** **BY S/ J. Richards** **CHIEF DEPUTY CLERK**

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).
It is so ORDERED.

s/ Becker, C.J.
Becker

s/ Douglas, J.
Douglas

s/ Parraguierre, J.
Parraguirre

cc: Hon. Jerome Polaha, District Judge
Thorndal, Armstrong, Delk, Balkenbush & Eisinger/ Reno
Anderson & Gruenewald

Beckett & Yott, Ltd./Carson City
Badger & Baker
David R. Ford
William L. Keane
Michael E. Langton
John Oceguera, Assemblyman
Woodley & McGillivary
Washoe District Court Clerk

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF NEVADA

PUBLIC AGENCY COMPENSATION TRUST (PACT) Appellant, vs. COLIN PERRY AND EMPLOYERS INSURANCE COMPANY OF NEVADA, Respondents.	No. 40241 **FILED** **FEB 01 2006** **JANETTE M. BLOOM** **CLERK OF THE SUPREME COURT** **BY S/ J. Richards** **CHIEF DEPUTY CLERK**

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.[1]

s/ Rose, J.
Rose

s/ Becker, C.J.
Becker

s/ Gibbons, J.
Gibbons

s/ Douglas, J.
Douglas

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[1] The Honorable A. William Maupin, Justice, voluntarily recused himself from participation in the decision of this matter.

s/ Hardesty, J.
Hardesty

s/ Parraguierre, J.
Parraguirre

cc: Hon. Jerome Polaha, District Judge
Thorndal, Armstrong, Delk, Balkenbush & Eisinger/ Reno
Anderson & Gruenewald
Beckett & Yott, Ltd./Carson City
Badger & Baker
David R. Ford
William L. Keane
Michael E. Langton
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Washoe District Court Clerk